IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No.

D. H. OVERMYER CO., INC., of Ohio,

and

D. H. OVERMYER CO., INC., of Kentucky, *Petitioners*

v.

FRICK COMPANY, a Pennsylvania Corporation,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF LUCAS COUNTY, OHIO

Petitioners pray that a writ of certiorari issue to review a judgment of the Ohio Court of Appeals for Lucas County at Toledo, Ohio, dated September 22, 1969, which the Supreme Court of Ohio subsequently refused to review by writ of error on December 17, 1969.

OPINION BELOW

There is no reported opinion by the Court of Appeals. A copy is set forth in the Appendix to this Petition (App. 20a-21a). The Ohio Supreme Court did not write an opinion. Its order dismissing the appeal on December 17, 1969, is here set forth in the Appendix (App. 22a).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S. Code, § 1257 (3). Under date of March 19, 1970, Justice Potter Stewart enlarged the time for filing this Application to and including April 16, 1970.

QUESTIONS PRESENTED

(1) May a State Court enter judgment on a promissory note without process or notice to the defendant, and without affording defendant an opportunity to be heard, where the note authorizes the holder to appoint any attorney "to confess judgment" in event of default?

(2) After judgment pro confesso has been entered on such a promissory note without notice to defendant, may the trial court refuse to grant a prompt and meritorious prayer to vacate the judgment and afford defendant a trial on the merits of his substantive defense tendered by sworn answer, showing complete failure of consideration for said note?

(3) Does federal constitutional due process require notice and opportunity for hearing at some point in the judicial proceeding, or may one party force the other in advance to surrender the constitutional right to notice and hearing as part of the consideration for the contract?

STATEMENT OF THE CASE

Petitioners had engaged a contracting firm to build and equip a cold storage warehouse in the City of Toledo, Ohio. Respondent corporation undertook, by sub-contract, to install the refrigeration plant called for by plans and specifications (proposed Answer of petitioners, App. 12a).

Payment of the purchase price, $223,000., was made partly in cash and partly by delivery of a promissory note due in monthly installments signed by petitioner, in the original amount of $130,977 (App. 4a). By a series of payments the balance due on said note was reduced some 50% to $62,370. (App. 4a), when the refrigerating plant suddenly suffered a complete cardiac collapse (App. 13a-18a).

As a result there was a loss of various goods in storage, and the entire cooling system had to be revised and renewed, at very great cost to petitioners. Petitioners notified respondent, and refused to complete the payments scheduled by the note, whereupon respondent corporation, payee and holder of the note, took judgment (App. 8a) in accord with the so-called "cognovit" provision:

> The undersigned hereby authorize any attorney designated by the Holder hereof to appear in any court of record in the State of Ohio, and waive this (sic) issuance and service of process, and confess a judgment against the undersigned in favor of the Holder of this Note, for the principal of this Note plus interest if the undersigned defaults in any payment of principal and interest * * * (App. 6a).

An Ohio attorney, wholly unknown to petitioners, appeared for petitioners, and confessed judgment[1] on July 12, 1968, in favor of respondent for the sum of $62,370, plus interest and costs (App. 7a).

Neither process nor notice was issued to petitioners as to the commencement of suit or the designation of counsel. Said counsel for petitioners did not inquire as to the existence of any possible defense, or matter of reduction, set-off or counterclaim.

The sole and only notice to petitioners was given after the judgment had been entered (App. 9a).

Petitioners immediately moved for a New Trial and to Vacate Judgment, setting forth by affidavit the breakdown of the equipment, the damages and great cost of replacement, and sought to defend the action on the note by showing a failure of consideration (App. 10a-11a). An Answer under oath accompanied the Motion to Vacate, showing a meritorious defense which was well known to respondent at the time it took the judgment (App. 12a-18a).

All these Motions were overruled, and prior orders for execution and discovery were affirmed (App. 19a).

On appeal petitioners specifically claimed a denial of due process by the procedure which denied notice and hearing before and after judgment, and completely by-passed a valid defense (App. 20a). [2d Assignment of error] The Court of Appeals in laconic terms found *"that the trial court,* **with no abuse of discretion,** *properly overruled the defendants-appellants motion to vacate the judgment."* It affirmed and remanded the cause (App. 20a-21a) (emphasis added).

Petitioners appealed to the Supreme Court of Ohio, claiming *inter alia,* a denial of the federal constitu-

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[1] This appears to conform to Ohio law, Rev. Code §2323.13 (App. 22a).

tional right to due process of law in the entry of judgment without notice, and in the refusal to consider for trial a valid defense, promptly tendered by the defendant after receiving notice of the judgment (App. 21a).

The Ohio Supreme Court wrote no opinion, but by printed form "the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein." (App. 22a)

REASONS FOR GRANTING THE WRIT

I. A Money Judgment Rendered Without Service or Notice to the Defendant Denies Fundamental Rights Protected by the Due Process Clause of the Fourteenth Amendment. Even Though Based Upon a So-Called Warrant of Attorney in a Promissory Note. In This the Decision Below Conflicts With Applicable Controlling Decisions of This Court.

Noteworthy is the fact that the Judgment Entry was stamped 4:22 p.m., *one minute* after the suit was filed on the note at 4:21 p.m. No process was issued; nor was any kind of notice given.

Judgment was "confessed" by an attorney who is a complete stranger on this record to both parties. He did not claim to be "designated by the Holder" of the note sued upon; nor did he allege any relationship with the defendants. He merely appeared as Attorney for Defendants "By virtue of the warrant of attorney contained in a certain promissory note . . ."

When petitioners were notified of the judgment, a Motion for New Trial was filed, supported by Affidavit of counsel alleging no notice (App. 10a-11a), and a proposed Answer was filed, showing that there existed between the parties a very serious dispute as to whether or not any part of the demand was really due (App. 12a).

This answer, under oath, alleged a gross failure of consideration for the note in suit. It recited demands

by petitioners for repairs and modifications in the equipment purchased with said note, and alleged that upon respondent's failure to perform its contract obligations, other persons were engaged to repair and service the plant. Thereupon petitioners declined to make further payments to respondent.

When respondent sued on this note and caused the entry of judgment without process or notice to petitioners, it completely denied petitioners all opportunity to put in a meritorious defense. In a very real sense the court has been used as an instrument of injustice, and the entry of judgment under such circumstances represents a fraud on the court and on these petitioners.

It requires no discussion to establish that this warrant of attorney is a prepotent device for securing a judgment, and collecting money, without risking a defense by the maker. *Hadden* v. *Rumsey Products, Inc.*, 196 F. 2d 92, 96 (1952); 31 Ohio Jur. 2d, *Judgments*, § 139 (1958).

Amply justified is the observation that such practice "is the loosest way of binding a man's property that was ever devised in any civilized country." *Alderman, Bateman & Bateman* v. *Diament*, 7 N.J.L. 197, 198 (1824).

The proceeding under review is clearly in conflict with *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969), where this Court, at its last term, held unconstitutional the Wisconsin statute authorizing pre-judgment garnishment without advance notice and hearing. The Court recognized that the debtor may eventually prevail upon a trial. "But in the interim the wage earner is deprived of his employment of earned wages without any opportunity to be heard and to tender

any defense he may have, whether it be fraud or otherwise." (p. 339).

If pre-judgment garnishment is bad for want of notice and hearing, it is inescapable that entry of judgment without such notice and hearing is equally bad, for such judgments generate garnishment, attachment, and liens on property—all pro tanto takings of the kind condemned in the *Sniadach Case*. Counsel for one of the largest finance companies had earlier recognized the identity of impact in telling terms:[1a]

> In Wisconsin where . . . under the small loan law, judgments by confession are prohibited, garnishment procedure may proceed prior to judgment. It is doubtful therefore whether there is any real or practical difference . . . The guy's wages have been garnished without prior notice in either case!

Even where a proper judgment existed against a corporation, this Court prohibited a creditor from seizing property of the owner of unpaid stock without notice and hearing.

> He was "entitled, upon the most fundamental principles, to a day in court and a hearing upon such questions as whether the judgment is void or voidable for want of jurisdiction or fraud, whether he is a stockholder and indebted, and other defenses personal to himself." (*Coe* v. *Armour Fertilizer Works,* 237 U.S. 413, 423 (1914).

This case is not one in which the defendants (petitioners here) were non-residents beyond the reach of

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[1a] Quoted in *Cognovit Judgments: An Ignored Problem of Due Process and Full Faith and Credit.* Hopson, 29 Chi L. Rev. 111, 121 (n.63) (1961), hereinafter cited as Hopson.

process. The second paragraph of the petition on which the judgment in issue was rendered sets forth correctly the address of the resident petitioner in the City of Toledo where the suit was filed (App. 3a).

Why should petitioners have been given no notice that they were being sued? Solely to prevent the raising of a defense which respondent couldn't meet.

In this Court, and at this time, discussion of the pervasive requirements of the due process clause is not required. The concept of fairness, opportunity to defend, substantial justice—these are ingrained constitutional principles, too valuable to be ignored.

In *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), it was said:

> (p. 314) "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis* v. *Ordean*, 234 U.S. 385, 394. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.
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> * * *
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> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. (Citations omitted). The notice must be of such nature as reasonably to convey the required information, *Grannis* v. *Ordean, supra,* and it must afford a reasonable time for those interested to make their appearance . . .

On the same ground the Court reversed a judgment based upon notice by publication against a non-resi-

dent, saying, per Holmes, J., "To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done." *McDonald* v. *Mabee,* 243 U.S. 90, 92 (1916).

When a husband in a divorce action was not notified of the entry of alimony charges against him, he "was thus deprived of an opportunity to raise defenses otherwise open to him . . . there was a want of judicial due process . . ." *Griffin* v. *Griffin,* 327 U.S. 220, 228 (1946). The judgment rendered in New York was held to be not entitled to full faith and credit in the District of Columbia. Chief Justice Stone, for the Court, said:

> (p. 231) Due process forbids any exercise of judicial power which, but for the constitutional infirmity, would substantially affect a defendant's rights . . . Even though petitioner could, if he knew of the judgment before execution is actually levied, move to set the judgment aside, that could not save the judgment from its due process infirmity, since it and the New York practice purport to authorize the levy of execution before petitioner is notified of the proceeding on the judgment.

II. Relief From an Invalid Judgment, Which Is Conditioned Upon a Demonstration That a Meritorious Defense Exists in the Court's Discretion, Is a Denial of Due Process of Law, and Conflicts With Applicable Decisions of This Court.

In Ohio judgments may be vacated during the term as an exercise of the court's inherent power, upon determining that the defendant has proper grounds, "sufficient in law to constitute a valid defense." *Bellows* v. *Bowlus,* 83 Ohio App. 90, 82 NE 2d 429, 430 (1948). Petitioners followed this procedure exactly (App. 10a-12a), complaining of the lack of notice.

The proposed Answer and Cross Petition (App. 12a) detail the failure of consideration for which the cognovit note was given, and spell out the damages occasioned by the defective equipment and improper installation. It is properly verified (App. 18a).

Without opinion or explanation on this record petitioners' prayers for relief were denied by the trial court, and discovery ordered in aid of prior execution (App. 19a).

On appeal petitioners urged the federal constitutional right, as a matter of due process, to present a defense when the judgment is taken without notice, and where a valid defense is asserted (App. 20a). The Court of Appeals affirmed without discussion, finding **"no abuse of discretion"** below (App. 21a). (emphasis added).

Relying on the Fourteenth Amendment and this Court's decision in *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969), petitioners asked the Supreme Court of Ohio to review the matter. This was dismissed by that Court *sua sponte* "for the reason that no substantial constitutional question exists herein." (App. 21a-22a).

It seems clear that the averments of the tendered answer for present purposes, should be treated as true. As this Court said in *Covey* v. *Town of Somers,* 351 U.S. 141, 145 (1956), reversing a judgment for improper notice,

> As this stage of the proceedings we are bound, as were the Courts below, to assume that the facts are as disclosed by the uncontroverted affidavits filed with appellant's motion to show cause.

Once notified of the proceedings, a defendant has an absolute right, as an element of a fair hearing, to intro-

duce evidence. *Saunders* v. *Shaw*, 244 U.S. 317, 319 (1917).

This opportunity to present his defense should not be prejudiced by the existence of the unlawful judgment. In *Armstrong* v. *Manzo*, 380 U.S. 545 (1965), a judgment of adoption was invalidated for want of notice to the natural father. He had learned of the adoption after it was completed, and sought to have it set aside. He was afforded a hearing to prove he had not forfeited the right to object, and he presented witnesses and depositions. The trial court, however, denied his motion to vacate the adoption decree, and confirmed the prior action.

This Court granted certiorari to settle two constitutional questions which seem to control completely the case at bar: (a) the requirement of notice, and (b) the curative effect of the subsequent hearing.

As to the first, it was held (380 U.S. at 550) the want of advance notice "violated the most rudimentary demands of due process of law." The cases are discussed in the terms set forth herein.

As to the subsequent hearing, that was wholly inadequate as a substitute for an orderly hearing in advance of judgment, because it shifted the burden of proof to the petitioner on issues to be proved by his opponent. The Court said (551):

> The burdens thus placed upon the petitioner were real, not purely theoretical. For "it is plain that where the burden of proof lies may be decisive of the outcome." *Speiser* v. *Randall*, 357 U.S. 513, 525. Yet these burdens would not have been imposed upon him had he been given timely notice in accord with the Constitution.

> (552) A fundamental requirement of due process is "the opportunity to be heard." *Grannis* v. *Ordean*, 234 U.S. 385, 394. It is an opportunity which must be granted at a meaningful time and in a meaningful manner. *The trial court could have fully accorded this right to the petitioner only by granting his motion to set aside the decree and consider the case anew.* Only that would have wiped the slate clean. **Only that would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place.** His motion should have been granted. (emphasis added)

That decision applies directly to the case under consideration, and points up sharply the denial of federal constitutional rights to notice and a fair hearing.[2]

It is notable that this Court, unlike the Court of Appeals below, did not suggest the right to full hearing in advance of judgment was a matter of "discretion." This Court placed the decision squarely on a basis of constitutional right.

A very sensible and perfectly sound disposition was reached in *Monarch Refrigerating Co.* v. *Farmers' Peanut Co.*, 74 F. 2d 790 (4th Cir. 1935). An Illinois judgment on a cognovit note was to be enforced in North Carolina. The District Court granted full faith and credit. The Court of Appeals, however, noted that the

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[2] *Armstrong* v. *Manzo* was the subject of at least two Law Review studies: 64 Mich. L. Rev. 726 (1966), *Conditioning of Relief from Unenforceable Judgment Upon Showing of Meritorious Defense to Claim Upon Which It Was Entered Can Deny Due Process;* 19 Southwestern L.J. 413 (1965), *Notice and Adoption—The Requirement of Due Process.*

defendant had never been afforded an opportunity to be heard; the cause was remanded for hearing of the defendant's contention that the officer who signed the note in question was without corporate authority for the act. This is essentially the same rule as *Armstrong* v. *Manzo supra*—to wit, there was no notice, therefore no binding judgment. Start over, with actual notice to the other side, and hear the defense.

III. Many Thousands of Judgments Are Taken Every Year on Cognovit Notes Without Process or Notice to the Defendants and Without Opportunity To Present Meritorious Defenses. Thus Forcing Settlement Under Threat of Garnishment of Wages, Seizure of Property, or Damage to Credit Standing. The Matter Is of National Importance and Merits This Court's Review on Certiorari.

In *Sniadach* v. *Family Finance Corp., supra,* this Court recognized the traumatic impact of garnishment without notice, and the gross unfairness produced by the necessity to protect jobs and families from unjustified demands. Identical results flow from judgments without notice, for these inevitably give rise to the very same evils.[3]

Some index of the evil use to which cognovit notes have been put is deduced from the widely varied treatment in the States. 7 States authorize them by statute; while 13 others make them void—including two (Indiana and New Mexico) which make their use a misdemeanor. 23 States have serious restrictions on use of such notes; 29 have small loan laws which pro-

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[3] In Illinois it appears now that before garnishment is permitted under a confessed judgment, there must be a trial de novo after notice to the defendant. Ill. Rev. Stat. Ch. 62, § 82 (1961).

hibit them, and 10 States prohibit their use in retail instalment sales.[4]

A study of the Municipal Court of Chicago shows that out of 193,191 suits filed in 1960, suits on confession of judgment numbered 45,402, or 23.5%. Additional figures for other Cook County courts were estimated at 1,000 per year.[5] It becomes readily apparent that a very large number of judgments are rendered in the manner now before the Court.

Small wonder that Indiana and New Mexico have made such conduct a crime! or that the AFL-CIO labor organizations have advocated the same kind of legislation elsewhere.[6]

In the *Sniadach Case* last term the Court outlawed attachment without notice. It seems clear now that judgment without notice is simply another means of initiating attachment without the requisites of due process; a backdoor to the forbidden garnishment.

The unfairness and invitation to fraud are obvious, not alone as to wage-earners, who are, of course, most often hurt; but also as to small business which could readily be plunged into bankruptcy by a huge judgment—however unjustified. The destruction of ordinary bank credit channels is a fate few businessmen can stand. Then, like the wage-earner who pay to avoid loss of his job, he may try to settle and arrange terms to get rid of the stigma on his credit rating—

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[4] Hopson, *supra*, 29 Chi. L. Rev. 111, 126-129; 35 U. Cincinnatti L. Rev. 470 (1966), *A Clash in Ohio?: Cognovit Notes and the Business Ethic of the UCC*, pp. 490-491.

[5] Hopson, *supra*, p. 119.

[6] See p. 15, *infra*, and note 10.

when he actually may have a valid defense on the merits.[7]

Morality of cognovit notes has engaged the attention of many students and commentators, from the Harvard Law Review statement:[8]

> The waiver of notice provision, however, may render enforcement of the notes unconstitutional.

to Professor Goodrich's unqualified forecast that this Court in a proper case will invalidate cognovit judgments.[9]

In Ohio, where this cause arose, the AFL-CIO council has taken a stand for legislation to make use of a cognovit note a misdemeanor.[10]

Broadly based statistical data on this subject appears to be unavailable, but some samples will indicate the scope of the problem. It has been said that 82% of Pennsylvania banks use cognovit notes, and, "In at least a dozen other states they are more or less widely used."[11] In Franklin County, Ohio, during a 6-month period, a total of 3,510 civil cases were filed, including 500 involving cognovit notes[12]; at this rate 1,000 each year in one Ohio county.

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[7] 35 U. Cincinnati L. Rev. 470, at 481 (1966), *A Clash in Ohio: Cognovit Notes and the Business Ethic of the UCC, supra.*

[8] 73 Harv. L. Rev. 909, at 944 (1960), *Developments in the Law —State Court Jurisdiction.*

[9] Goodrich, Conflict of Laws, § 73 (4th ed. 1964).

[10] 35 U. Cincinnati L. Rev. 470 (1966), *A Clash in Ohio?: Cognovit Notes and the Business Ethic of the UCC,* p. 489, n. 136.

[11] 8 Ohio State L. J. 1 (1941), Hunter, *The Warrant of Attorney to Confess Judgment,* p. 2 n. 6: cited herein as Hunter.

[12] Hunter, *supra,* p. 14.

Obviously no wage-earners or small businessmen, and few of any defendants so oppressed, are financially able to carry a case through the courts to this stage. In fact, research has failed to disclose a single case of this precise issue in this Court. Despite the broad impact of the problem, the average defendant doesn't know his rights and can't afford to protect them. With more than 45,000 confessed judgments in a single year in one Chicago court, the national scope of the problem becomes self-evident, and the vitality of the due process clause requires the voice of this Court.

CONCLUSION

This Court should grant certiorari to review the decision of the Ohio Court of Appeals refusing to vacate a judgment entered without notice to petitioner, and sustaining, as a matter of "discretion," denial of petitioners' prayer for leave to prove a valid defense to said note on the merits. The matter is of national importance, affecting wage-earners, small borrowers, installment buyers, in the thousands through the States.

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